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No. 52915-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FLOYD F. RINEHOLD and CLARISSA E. RINEHOLD,

Plaintiffs/Respondents,

v.

GARY T. RENNE and ELEANOR F. RENNE,

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The crux of the Rineholds' response is premised on their conclusion that Holman's 2015 survey is an indisputable representation of W.O. Watson's intent in the 1950s. But whether their conclusion is correct as a matter of law is the subject of this appeal, and merely repeating the conclusion throughout the response brief does not make it true.

On the merits, the Rineholds fail to rebut even one of the issues of material fact discussed in the Rennes' opening brief. The Rineholds also present cursory analyses of the relevant case law and decline to address the salient points of those cases highlighted by the Rennes. Ultimately, issues of material fact remain as to whether the "roadway" called to in the deeds means the actual roadway, or a line divined by Holman in 2015. This is a basic question for trial. The superior court erred in granting summary judgment and denying reconsideration. This Court should reverse.

II. STATEMENT OF THE CASE

The Rennes stand by the statement of the case presented in their opening brief. The contrary interpretation of the facts and evidence presented in the Rineholds' response brief underscores the impropriety of partial summary judgment.

The Rineholds' response also includes unsupported and inaccurate factual representations made, seemingly, to cast aspersions upon the

Rennes, and Ms. Renne individually. Several such representations, though certainly not all, are called-out below. This Court’s review of the citations, or lack thereof, for such representations will show they are not only unsubstantiated, but also have nothing to do with the issue in this appeal—i.e., whether the superior court erred in finding, as a matter of law, that the deeds’ calls to the “roadway” did not mean the actual roadway.

III. ARGUMENT

A. All Evidence Considered by the Superior Court Is Reviewed De Novo by This Court.

The Rineholds’ response focuses on disputing the persuasiveness, timeliness, competence, and propriety of the evidence submitted on summary judgment and reconsideration.¹ Such arguments are superfluous on appeal because the superior court considered all this evidence in making its rulings on summary judgment and reconsideration. All this evidence is, therefore, reviewed by this Court de novo and in the light most favorable to the Rennes.²

¹ Amended Response Brief (“Resp. Br.”) 2, 10-11, 13, 16-23, 29-31, 33.

² See e.g., *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754, 162 P.3d 1153, 1159 (2007) (“It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court. That record includes those documents designated in an order granting summary judgment and any supplemental order of the trial court.”).

In a similar vein, the Rineholds argue the declarations of prior property owners were improperly cited on appeal because they were excluded by the superior court.³ The Rineholds are incorrect. This Court reviews de novo the superior court's evidentiary rulings on declarations submitted with summary judgment papers.⁴

Moreover, the superior court's rulings were erroneous. The superior court excluded those declarations as "not relevant" because they "d[id] not address either the existence of the roadway at the time of the original deed or installation of the road by the parties to the original deed."⁵ The Rennes challenged that ruling on appeal.⁶ On appeal, Rineholds aptly illustrate the relevance of the prior owners' property use. For example, the Rineholds argue their current claim is supported by the absence of encroachments identified in Holman's 1994 short plat and Lovitt's 1979 unrecorded plat because "at that time there weren't any [encroachments]."⁷ But the

³ Resp. Br. 36.

⁴ *Moore v. Hagge*, 158 Wn. App. 137, 147, 241 P.3d 787 (2010) ("The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.' 'This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party' and the appellate court 'conduct[s] the same inquiry as the trial court.'") (internal citations omitted).

⁵ 1VRP 8.

⁶ Appellants' Opening Brief ("Op. Br.") 2 ("The superior court erred in granting the Rineholds' motion for partial summary judgment, striking the evidence submitted therewith, and denying the Rennes' motion to reconsider.") (emphasis added).

⁷ Resp. Br. 35.

declarations of the prior owners reject that assertion and are, therefore, relevant.⁸ The superior court erred.⁹ Regardless, the evidence is properly reviewed by this Court on appeal.¹⁰

B. The Rineholds Rely on Circular Logic and Decline to Address the Genuine Issues of Material Fact.

1. The Rineholds' argument is circular.

The repeated argument in the Rineholds' response is that Holman's 2015 survey is an indisputable representation of W.O. Watson's intent in 1952, and therefore, Holman's 2015 survey defines what "roadway" means in the Rennes' deed.¹¹ Their argument is unsound because it is circular.¹² It assumes as true their conclusion on a central issue of this appeal—

⁸ CP 123-24 (declaration of Moore); CP 132-33 (declaration of Addington).

⁹ See generally *Tanner Elec. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674-75, 911 P.2d 1301 (1996) (reviewing evidence presented on reconsideration that was excluded by the trial court as irrelevant and holding the trial court's exclusion of that evidence was erroneous because the evidence was relevant).

¹⁰ 1VRP 8; *Tanner Elec.*, 128 Wn.2d at 674-75.

¹¹ E.g., Resp. Br. 28 ("Holman's determination as to W.O. Watson's intent controls.").

¹² See e.g., *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 697, 167 P.3d 1112 (2007) ("This argument is unsound because it is circular—Cotter assumes his conclusion, that California law applies, as a premise in his argument that applying Washington law is contrary to California policy and therefore California law applies."); 697-98 ("This argument, too, is circular—Cotter's conclusion, that California law applies, is a necessary prerequisite to Erwin's business practice being illegal in California, the premise supporting Cotter's conclusion that California law applies."); *Penick v. Employment Sec. Dep't*, 82 Wn. App. 30, 38, 917 P.2d 136, 142 (1996) ("Penick first suggests that the Commissioner lacks jurisdiction to consider the status of the contract drivers because the Employment Security Act covers only persons in 'employment' and, he contends, the drivers are not in his employment. This argument, of course, is circular and begs the question before us—whether the drivers were in Penick's employment or were independent contractors.").

whether Holman’s 2015 survey is an indisputable representation of W.O. Watson’s intent in 1952. Then, by assuming that question is resolved in their favor, the Rineholds answer the broader question presented—whether the term “roadway” in the deeds means the actual roadway—in their favor. The argument should be rejected.¹³

2. The circular argument is predicated on a misreading of the rules for interpreting property rights through deeds.

The Rineholds contend the priority of calls is “1. Intent of the grantor”; “2. Lines run on the ground”; “3. Reference to monuments in a deed.”¹⁴ This too is incorrect.

The intent of the parties, and, if possible, the intent of the original grantor is determined by construing deeds.¹⁵ Intent is not part of the priority of calls. Rather, intent can be determined using the priority of calls: “(1) lines actually run in the field, (2) natural monuments, (3) artificial monuments, (4) courses, (5) distances, (6) quantity or area.”¹⁶ To complete the analysis, courts “determine the intent of the parties from the language

¹³ *Erwin*, 161 Wn.2d at 697 (“This argument is unsound because it is circular”).

¹⁴ Resp. Br. 32.

¹⁵ *Newport Yacht Basin Ass’n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012) (“[D]eeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document.”) (quoting *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007)).

¹⁶ *E.g., DD & L, Inc. v. Burgess*, 51 Wn. App. 329, 335-36, 753 P.2d 561 (1988).

of the deed as a whole,” and “must give meaning to every word if reasonably possible.”¹⁷ Where ambiguity exists, courts “consider the circumstances of the transaction and the subsequent conduct of the parties in determining their intent at the time the deed was executed.”¹⁸

By treating “intent of the grantor” as part of the priority of calls, rather than the result of applying the priority of calls, the Rineholds create a legal fiction to dictate a desired result. It is analogous to using a factor-test to determine a cause of action where one of the factors is the cause of action. That is what the Rineholds attempt to do here.

3. The Rineholds do not address the material inconsistencies in Holman’s 2015 survey.

As noted above, the Rineholds’ argument is predicated upon Holman’s 2015 survey being an unassailable representation of Watson’s intent in the 1950s.¹⁹ Yet, the Rineholds do not refute any of the material inconsistencies in Holman’s 2015 survey. The Rineholds instead, summarily contend the Rennes “point to no opinion of an expert that ...

¹⁷ *Newport*, 168 Wn. App. at 64 (quoting *Hodgins v. State*, 9 Wn. App. 486, 492, 513 P.2d 304 (1973)).

¹⁸ *Id.* at 65.

¹⁹ The functional equivalent of this assertion is the Rineholds’ repeated statements that Holman’s 2015 survey was “consistent with prior surveys” and “consistent with everything.” Resp. Br. 1-2, 14-15, 29. The testimony of James Dempsey shows these statements are not true, CP 306-07, and at the very least, questions of material fact remain.

would question Holman's ultimate conclusions."²⁰ This argument ignores two expert declarations submitted by the Rennes: the expert testimony of surveyor James Dempsey²¹ and the expert testimony of Geographic Information Systems specialist Pete Kauhanen.²² Both experts explicitly question Holman's ultimate conclusions.²³

²⁰ Resp. Br. 31-32. This argument is included in the Rineholds' response under a title asserting, "the call in the deed does not create an ambiguity in the context of the summary judgment motion." Resp. Br. 31 (capitalization omitted). The assertion in this title is contradicted by the superior court, which found "the language is at least potentially ambiguous and will look to extrinsic evidence to determine whether there is an issue of material fact regarding the location of the westerly boundary of the roadway." 1VRP 5. The Rineholds did not cross-appeal this finding nor make any further-developed argument.

²¹ Rineholds do not dispute that Dempsey is an expert in their response. However, to the extent their citations to *Rue v. Oregon & W.R. Co.*, 109 Wn. 436, 186 P.1074 (1920), RCW 18.43.020, and others for the proposition "that the testimony of a person with insufficient expertise (engineers) was not competent evidence," were veiled attacks on Dempsey, those attacks fail. Resp. Br. 30. First, the superior court considered his testimony, thereby making it part of this Court's review. 1VRP 16; *Tanner Elec.*, 128 Wn.2d at 674-75. Second, the Supreme Court has accepted surveys and testimony from college students who not only were not professional surveyors, but had only, potentially, taken "a basic course" in surveying as part of their forestry majors. *Mullally v. Parks*, 29 Wn.2d 899, 901, 190 P.2d 107 (1948).

²² The Rineholds devote substantial effort in their response to persuading this Court to give less weight to Kauhanen's testimony. Resp. Br. 20-21. That is not the function of this Court, which reviews this evidence de novo and in the light most favorable to the Rennes. 2VRP 122 (denying the Rineholds' motion to strike); *Tanner Elec.*, 128 Wn.2d at 674-75.

²³ CP 307 ("east and west lines for Tract 6 (the Rennes' parcel) per AFN 1865233 are reasonably close to the originally unrecorded plat – approximately .8' of the calculated plat lines. Holman's survey does not match this."), 307 ("the Holman survey does not match the east line of the plat line."), 307 ("another material inconsistency in the Holman survey is the width of the roadway. The Holman ROS does not match the width shown on the original plat."), 293 ("the indicated roadway [in the 1951 photograph] is in the exact location as East Sunset View Lane is in all other subsequent imagery for this area."), 297 ("there is no doubt in my mind that East Sunset View Lane has been an actual roadway where indicated from at least as early as the 1950s."), 297 ("the width of the traveled portion of the roadway has remained roughly the same for the last 67 years.").

The following summarizes the material inconsistencies in Holman's ultimate conclusions and any conceivable rebuttal the Rineholds offered:

First, Holman's 2015 survey relies on monuments placed by Lovitt in 1979 and Holman in 1994, and disregards monuments (*e.g.*, the "roadway") Watson identified.²⁴ The Rineholds do not, and cannot, explain how Holman's 2015 survey accurately shows Watson's intent, as a matter of law, when Holman relied on monuments Watson did not place and ignored monuments Watson identified.

Second, Watson's plats shows the roadway was 42 feet wide at the intersection with SR 106, but Holman's 2015 survey ignores that intent and decided the roadway should be over 52 feet wide at the same place.²⁵ Holman then stated Watson would never make such a "significant" mistake as to be off by 12 feet "more or less."²⁶ The Rineholds do not reconcile for this Court how Holman's 2015 survey can be indisputably representative of Watson's intent when Holman rejects Watson's explicit intent for the roadway's width. Importantly, too, the Rineholds do not explain how any court could determine, as a matter of law, that it was within Watson's course

²⁴ CP 24, 27, 29, 32, 34, 36, 305-07; Op. Br. 28-29.

²⁵ Compare CP 32, 29, 206, 208 (all showing Watson's intent of a 42-foot roadway width) with CP 27 (showing Holman's calculation that the roadway width was 52.14 feet, the distance between the points he designated "L4" and "L5").

²⁶ CP 23-24, 27, 29, 32, 206, 208, 305-07; 2VRP 47-49; Op. Br. 29.

of practice to make mistakes of more than 10 feet but not 12 feet “more or less.”

Third, Holman’s 2015 survey refuses to consider an estimated ½ inch thick iron pipe as a potential monument because it was not a “large” monument, yet simultaneously relied on ½ inch iron stakes and iron pipes ranging in thickness from ¾ inch to 2 inches.²⁷ Holman did not articulate what Watson considered a “large” monument, and the Rineholds ignore this point in their response. Rather, contrary to the summary judgment standard, the Rineholds ask this Court to infer, as the superior court must have, that pipes between ¾ inches and 2 inches are “large” and ½ inch is only “large” when it is a stake.

Fourth, Holman discovered a new pipe of undisclosed thickness at an inconsistent location in his 2015 survey and decided to rely on that new pipe as a monument set by Watson.²⁸ Holman simultaneously chastised the potential validity of a pipe discovered by the Rennes’ contractor:

I can indicate that in my many years of surveying, it is not uncommon to find random pipes in the ground. That can be placed for all sorts of different reasons unrelated to boundary lines, or erroneously placed by someone with a vested interest subsequent to the division of the properties.²⁹

²⁷ CP 27, 34; Op. Br. 29-30.

²⁸ 2VRP 44-46.

²⁹ CP 24. The Rineholds also seem to rely on this CP for their otherwise-unsupported discussion of the types of monuments that would have been set by Lovitt and Holman.

Missing the irony, the Rineholds' response again dismisses the validity of newly discovered pipes stating, for example, "Lovitt and Holman never identified that stake [found by the Rennes' contractor]."³⁰ Of course, neither Lovitt nor Holman had identified the stake Holman discovered in 2015 either.³¹ The Rineholds ignore this double-standard in their response.

Fifth, in his 2015 survey, Holman applies different angles than those applied by Watson.³² In fact, Holman's 2015 survey applies different angles than he applied in 1994,³³ and applies different angles than Lovitt applied in 1979.³⁴ The Rineholds do not offer any argument to dispute that Holman's failure to follow the angles Watson used creates an issue of material fact as to whether Holman's 2015 survey is a faithful retracement of Watson's intent.

Resp. Br. 14. CP 24 does not support the statement, nor does anything in the record. The statement is irrelevant on its own, but is part of the series of unsupported representations made by the Rineholds that paints an inaccurate picture of what actually exists in the record. See e.g., *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) ("RAP 10.3(a)(4), (5) and RAP 10.3(b) require that reference to the relevant parts of the record must be included for each factual statement contained in the sections of the parties' briefs devoted to the statement of the case and to argument.").

³⁰ Resp. Br. 14.

³¹ 2VRP 44-46.

³² Compare CP 27 (Holman's 2015 survey) with CP 29-32, 206, 208 (Watson's plats); 2VRP 47-49.

³³ Compare CP 27 (Holman's 2015 survey) with CP 36 (Holman's 1994 short plat).

³⁴ Compare CP 27 (Holman's 2015 survey) with CP 34 (Lovitt's plat).

Sixth, Holman’s 2015 survey identifies supposed encroachments on the Rineholds’ property, which would have been identified by the prior surveys had the encroachments existed.³⁵ The Rineholds state that “at that time there weren’t any.”³⁶ Implicitly, the Rineholds are suggesting the encroachments were created between 1994 and 2015.³⁷ But the summary judgment record supports the opposite inference.

The record shows the size and location of the roadway has not changed since 1951,³⁸ and shows that improvements were made to the Rennes’ land up to the westerly edge of the road prior to, and after, 1993.³⁹ These improvements would be considered encroachments if the improved-upon property had not been owed by the Rennes’ predecessors. The fact that no encroachments were identified, despite the record showing improvements were made by the Rennes’ predecessors on the disputed

³⁵ Resp. Br. 5 (stating existing encroachments “would have been required by law to note.”). The Rineholds also imply, without citation, that they tried to resolve this dispute with the Rennes amicably and the Rennes refused. Resp. Br. 6. The Rennes strongly disagree with the Rineholds’ characterization of “facts” not in the record, but, as these statements are not supported by citation, this Court should disregard them. *Litho Color*, 98 Wn. App. at 305.

³⁶ Resp. Br. 35.

³⁷ Resp. Br. 35; *cf. Moore*, 158 Wn. App. at 146-47 (“we construe facts and reasonable inferences in the light most favorable to the nonmoving party.”)

³⁸ CP 293-94, 297.

³⁹ CP 123-24.

property prior to when the surveys were completed, precludes summary judgment against the Rennes now.

Thus, the Rineholds' argument works against them. The Rineholds purchased their property in 2005.⁴⁰ At that time, the prior owners of the Rennes' property had made improvements on the property, and maintained those improvements, up to the edge of the roadway.⁴¹ As the Rineholds argue, "the Lovitt survey and earlier Holman survey were recorded and they were on notice thereof" that no encroachments existed.⁴² The Rineholds fail to reconcile how the lack of encroachments previously identified helps their argument on appeal.

Seventh, Holman disregards the priority of calls in his 2015 survey when he determined Watson's call to a monument—the "road-way"—must be ignored in favor of Watson's calls to courses and distances.⁴³ The Rineholds' only attempt at justifying Holman's deviation is to repeat their

⁴⁰ CP 53.

⁴¹ CP 123.

⁴² Resp. Br. 29.

⁴³ CP 23 ("if one were to interpret the references to the roadway in the Renne chain of title as being the present, physical roadway, the description would not close by twelve feet more or less").

conclusion that Holman's survey evidences Watson's intent.⁴⁴ As explained above, this logic is circular and should be rejected.⁴⁵

The bottom line, the Rineholds' repeated assertion that Holman's 2015 survey indisputably represents Watson's intent does not make the assertion true. As discussed herein, numerous material questions of fact exist any one of which calls for reversal of the superior court's grant of summary judgment.

C. The Rineholds' Case Law Discussions Miss the Point.

1. *Thompson v. Schlittenhart*

The Rineholds maintain that their position "in the present case is consistent with *Thompson v. Schlittenhart*."⁴⁶ They assert the entire thrust of *Thompson* is that the intent of the grantor should control, and then repeat their assertion that Holman's 2015 survey is the undisputed representation of Watson's intent.⁴⁷ This argument relies on the same circular logic that plagues other parts of their brief. It also omits that, in *Thompson*, the result was based on the weight of evidence after a trial on the merits, not on

⁴⁴ Resp. Br. 26.

⁴⁵ See Section B.1, *supra*; *Erwin*, 161 Wn.2d at 697.

⁴⁶ Resp. Br. 27 (citing *Thompson v. Schlittenhart*, 47 Wn. App. 209, 753 P.2d 48 (1987)).

⁴⁷ Resp. Br. 27-29.

summary judgment.⁴⁸ The Rennes discussed four such salient pieces of evidence in their opening brief on pages 37-39. The Rineholds offer nothing in response.

2. *Ray v. King County*

The Rineholds argue *Ray v. King County*⁴⁹ is inapplicable because the case does “not in any way suggest that proof of activities 50-65 years later should be considered in interpreting deeds and plats.”⁵⁰ The Rineholds’ argument misses the import of *Ray* and ignores the evidence showing the existence and similar size of the “roadway” contemporaneous to the original conveyance.⁵¹

In *Ray*, the court rejected an argument similar to the Rineholds’ here: that the boundary line described in the deed as the “railway track” could not mean “the location where the railroad track was actually constructed because the actual location of the railroad is not in the location described by the course and distance calls in the deed.”⁵² The *Ray* court rejected this argument and explained, “If the description in a deed of the land is fixed by ‘ascertainable monuments and by courses and distances, the

⁴⁸ See *Thompson*, 47 Wn. App. at 211-12 (discussing the facts relevant to the decision).

⁴⁹ 120 Wn. App. 564, 88 P.3d 183 (2004).

⁵⁰ Resp. Br. 35.

⁵¹ See CP 293, 294, 297.

⁵² 120 Wn. App. at 590.

well-settled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls.”⁵³

Here, the Rineholds argued the boundary line described in the deed as the “roadway” cannot mean the location of the actual roadway because “the description would not close by twelve feet more or less.”⁵⁴ This is nearly the exact argument rejected in *Ray* and the Rineholds make no effort to explain why this Court should not similarly reject the argument.⁵⁵ The Rineholds also ignore the evidence in the record expressly contradicting their argument: the visual and expert testimony establishing the existence and similar size of the roadway at the time of the original survey.⁵⁶ Thus, the Rennes, in fact, have more evidence in their favor than existed in *Ray*. The Rineholds’ attempt to distinguish *Ray v. King County* in their favor fails.

3. *DD & L, Inc. v. Burgess*

Finally, the Rineholds do not reconcile their position with the holding in *DD & L, Inc. v. Burgess*.⁵⁷ The *DD & L* court reiterated, “what are the boundaries is a question of law, and where the boundaries are is

⁵³ *Id.* at 591 (quoting *Matthews v. Parker*, 163 Wash. 10, 14, 299 P. 354 (1931)).

⁵⁴ CP 23.

⁵⁵ *Ray*, 120 Wn. App. at 591.

⁵⁶ *Compare* Resp. Br. 35 with CP 293, 294, 297.

⁵⁷ 51 Wn. App. 329, 753 P.2d 561 (1988); *see also* Op. Br. 34-35 (discussing *DD & L*).

question of fact.”⁵⁸ Further, “[t]hough the monument referred to in a deed does not actually exist at the time the deed was drafted, but is afterwards erected by the parties with the intention that it shall conform to the deed, it will control.”⁵⁹

Here, the “roadway” is a boundary called to in the deeds for the Renne property when Watson conveyed it, and when the Renns purchased it.⁶⁰ Where that boundary is, is a question of fact.⁶¹ The record shows the “roadway” actually existed at the time the deed was drafted.⁶² Moreover, per *DD & L*, even if the roadway were “afterwards erected by the parties with the intention that it shall conform to the deed” the result would be the same: the call to the roadway would control.⁶³ At minimum, a question of fact remains.

⁵⁸ *Id.* at 335 (quoting *Rusha v. Little*, 309 A.2d 867, 869 (Me. 1973)) (alteration in original).

⁵⁹ *Id.*

⁶⁰ CP 144, 92-93.

⁶¹ 51 Wn. App. at 335; *see also Moore*, 158 Wn. App. at 146-47 (“we construe the facts and reasonable inferences in the light most favorable to the nonmoving party.”)

⁶² CP 293, 294, 297.

⁶³ 51 Wn. App. at 335.

D. The Rineholds (Moving Party) Ask This Court to Make Factual Determinations Against the Rennes (Non-Moving Party).

The impropriety of summary judgment is highlighted by the factual determinations the Rineholds ask this Court to make. The most telling examples are where the Rineholds ask this Court to:

Please note the width of the clearing compared to the width of the clearing for SR 106. The widths are similar. Photos of the presently existing roadway show it is significantly narrower.

...

A simple review of the photo indicates that interpretation is not reasonable. A cleared area is shown. It compares in width to SR 106. The width of the Rinehold property in this area is 40-5- feet which would be consistent with a state highway.⁶⁴

The Rineholds ask this Court to eye-ball road widths and construe the Court's eye-ball test in the Rineholds' favor. Such request is contrary to the basic summary judgment inquiry.⁶⁵ Such request also attempts to vest this Court with the expert ability to interpret and opine upon spatial locations in photographs. This is the same expert ability the Rineholds argued Pete Kauhanen—an actual expert at interpreting spatial locations from historical aerial photographs—did not possess.⁶⁶ It is the fact-finder's

⁶⁴ Resp. Br. 15, 19 (internal citations omitted).

⁶⁵ *Moore*, 158 Wn. App. at 146-47.

⁶⁶ *Compare* Resp. Br. 18-19 (challenging the credibility of Kauhanen's expert opinion) and 20-21 (stating the Rineholds' expert disagreed with Kauhanen's expert opinion and providing the Rineholds' counsel's non-expert opinion) *with* CP 289-97 (Kauhanen Decl.

job to evaluate and weigh the visual and testimonial evidence at a trial. On summary judgment such evidence is not to be weighed but rather construed in favor of the non-moving party—here, the Rennes.⁶⁷

E. The Rineholds Acknowledged that Evidence of the Roadway’s Existence Could Defeat Their Motion.

The Rineholds acknowledged to the superior court that evidence of a roadway existing when Watson surveyed the land in the 1950s could defeat their motion for partial summary judgment.⁶⁸ They so acknowledged because proof of the existence of the roadway when Watson surveyed the land would evidence his original intent that “roadway” in the original deed referred to the actual roadway. The superior court justified summary judgment by citing the absence of evidence regarding “whether the roadway existed at that the time the deed was drafted.”⁶⁹ Accordingly, the Rennes

explaining his qualifications as at Geographic Information Specialist to include “interpret[ing] historical aerial imagery” to “associate[e] an object or structure—including historical objects or structures—with current locations in physical space” and “analyze[] spatial location.”

⁶⁷ *Moore*, 158 Wn. App. at 146-47.

⁶⁸ 2VPR 37 (“what is totally fatal to the defense is there’s no proof in this record whatsoever of what existed on that ground in the 1952 to 1955 timeframe. There’s no proof that there was even a road in existence at that time. There’s no proof where that road was. And so it was the clear intention that the roadway was to be the platted roadway.”); CP 165 (“The position of Rennes[] fails because: 1. They provide no expert opinion contradicting the current and historical surveys. 2. They provide no evidence which examines the totality of the circumstances in 1952-55. 3. They do not contradict Holman’s conclusion as to W.O. Watson’s original monumentation....”).

⁶⁹ 1VRP 5.

presented visual evidence and expert testimony from Kauhanen showing the roadway has existed in the same place with the same width since at least 1951.⁷⁰ This alone is grounds for reversal.

On appeal, the Rineholds respond by misreading the record. They assert the Rennes “never show[ed] that any roadway, circa 1952-1955, if existing, was inconsistent with Holman.”⁷¹ This assertion is belied by the record, where the parties’ conflicting evidence is plain.⁷² Holman’s declaration says the roadway today could not be the roadway Watson surveyed in the 1950s (Rineholds’ evidence), but Kauhanen testified the roadway “has remained roughly the same for the last 67 years” (Rennes’ evidence).⁷³

In another instance, the Rineholds claim “Kauhanen never attested that this road he perceived was in the same location as the present road.”⁷⁴ This is also incorrect. Kauhanen testified: “the indicated roadway [on the 1951 photo] is in the exact location as East Sunset View Lane is in all other

⁷⁰ CP 292-96 (visual evidence); CP 297 (expert testimony).

⁷¹ Resp. Br. 32.

⁷² *E.g.*, CP 289-97.

⁷³ *Compare* CP 23-24, 27 *with* CP 297.

⁷⁴ Resp. Br. 33.

subsequent imagery for this area that I have reviewed. This includes imagery from 1951, 1968, and recent imagery.”⁷⁵

In short, the visual and expert testimony evidencing the existence of the roadway when Watson called to the “road-way” as a monument in the 1950s defeats the Rineholds’ summary judgment motion.⁷⁶ The Rineholds acknowledged as much below and the Rineholds cannot identify a basis in fact or law to avoid that outcome on appeal.⁷⁷ This Court should reverse.

F. A Competing Survey Is Not Required When Issues of Material Fact Exist Regarding the Validity of the First Survey.

The Rineholds’ response asserts that the only way the Rennes could overcome summary judgment is by presenting a competing survey.⁷⁸ This assertion is contrary to the assertion they made in the superior court and lacks support in the law interpreting property rights.

First, as noted in the preceding section, the Rineholds acknowledged to the superior court that their motion could be defeated with evidence that

⁷⁵ CP 294.

⁷⁶ *Ray*, 120 Wn. App. at 592; *DD & L*, 51 Wn. App. at 336.

⁷⁷ 2VRP 37; CP 165.

⁷⁸ *E.g.*, Resp. Br. 28-29. The Rineholds also assert the Rennes hired three surveyors and that should be construed against the Rennes. Resp. Br. 2, 13-14, 31. Their citations do not support their assertion. Their citations are to Holman’s own declaration saying he believed the Rennes “contacted at least one surveyor,” and the Rineholds’ counsel’s own statements to the superior court. Resp. Br. 2, 13-14, 31 (each citing “CP 24, RP 35, 104”).

a roadway existed at the time of Watson's original plat.⁷⁹ The Rennes presented such evidence and summary judgment was, therefore, improper.⁸⁰

Second, the Rineholds' assertion lacks practical sense, which may be why they do not cite any supporting legal authority. The purpose of submitting a competing survey would be to point out where the respective surveyors disagreed. It makes no sense, therefore, why the law would require those disagreements be conveyed visually (in a survey) rather than verbally (in a declaration). Indeed, some disagreements are more effectively conveyed verbally than with a competing survey. For example, Dempsey, a professional surveyor, testified that neither Holman's 1994 short plat, nor Holman's 2015 survey could mathematically close.⁸¹ If only a competing survey from Dempsey were submitted, it is hard to imagine how Dempsey could articulate the errors he identified in Holman's survey.

Further, commissioning a survey is expensive. It would be patently unfair for courts to require the party not bearing the burden of proof to commission a competing survey when a professional surveyor can identify and explain, at a much lower cost, material errors in a survey commissioned by the party with the burden of proof.

⁷⁹ 2VRP 37.

⁸⁰ CP 289-97.

⁸¹ CP 306.

In sum, there is no basis in law or policy for the Rineholds' assertion that the only way to defeat their motion is through submission of a competing survey. This Court should reject the assertion.

G. Adverse Possession and Defense of the Quiet Title Action Are Relevant to the Issue on Summary Judgment.

The Rineholds argue the legal theory of adverse possession and the equitable defense of their quiet title action are “to be determined by the trial court after this appeal.”⁸² In so arguing, the Rineholds ignore the interplay between the priority of calls and other legal and equitable principles. As the Rennes pointed out in their opening brief, where the intention of the original surveyor is ambiguous due to discrepancies in the calls, “the lines marked by survey on the ground prevail, save for intervening equities arising by contract, conveyance, estoppel, prescription, or the application of well-defined legal and equitable concepts.”⁸³

⁸² Resp. Br. 36.

⁸³ *Staaf v. Bilder*, 68 Wn.2d 800, 803-04, 415 P.2d 650 (1966) (internal citations omitted) (emphasis added); *see Stewart v. Hoffman*, 64 Wn.2d 37, 42, 390 P.2d 553 (1964) (“where a boundary has been defined in good faith by the interested parties and thereafter for a long period of time acquiesced in, acted upon, and improvements made with reference to the line, such a boundary will be considered the true dividing line and will govern. Whether or not the line so established is correct is immaterial.”); *see also Weidlich v. Independent Asphalt Paving Co.*, 94 Wash. 395, 404-05, 162 P. 541 (1917) (holding that if the location of the street matched the original street monuments as platted, such was “conclusive”; but, if they did not match, “and the parties bought with reference to the stakes upon the ground at the time they bought, they are bound thereby.”); *Farrow v. Plancich*, 134 Wash. 690-91, 236 P. 288 (1925) (holding that whether a newer survey and newer fence conflicted with the prior survey and prior fence was immaterial because “the lapse of time and action of the parties” fixed the line from the prior survey and prior fence “as the true line.”); *Mullally*, 29 Wn.2d at 906-07 (holding that wherever the boundary line was

Here, the superior court stopped after the first clause and neglected to consider the requisite “save for” qualifier.⁸⁴ This Court should reverse and remand so that the survey and “the application of well-defined legal and equitable concepts” may be considered, consistent with Washington law.⁸⁵

IV. CONCLUSION

The superior court erred in granting summary judgment and denying reconsideration. Issues of material fact remain as to whether the “roadway” called to in the deeds means the actual roadway (the Rennes’ evidence, including expert evidence), or to a line divined by Holman in 2015 (the Rineholds’ evidence). Because there is competing evidence on a core issue in dispute, summary judgment is not appropriate. This Court should reverse.

“originally established” was “now immaterial” because the actions, beliefs, and improvements made by the current owners of the property to the north and their predecessors over the preceding twenty years established the “true line.”).

⁸⁴ *Id.*

⁸⁵ *Id.*

Respectfully submitted this 20th day of May, 2019.

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